

This is a claim for a November 30, 1999, work-related automobile accident. In the August 2, 2005, Award, Judge Avery determined claimant was permanently and totally disabled due to the accident and resulting injuries. Therefore, the Judge awarded claimant permanent total disability benefits. Furthermore, the Judge awarded claimant ongoing psychiatric care with her treating psychiatrist, Dr. Elias Chediak, until she is released from treatment.

Respondent contends Judge Avery erred. Respondent argues claimant has failed to prove she is permanently and totally disabled. Instead, respondent contends claimant is capable of working and, therefore, she should receive an award under K.S.A. 44-510e for a 15 percent permanent partial general disability, which is based upon her whole person functional impairment. Furthermore, respondent argues claimant has failed to prove she needs ongoing medical treatment with the exception of medication in the form of Dilantin. Consequently, respondent requests the Board to modify the August 2, 2005, Award.

Conversely, claimant contends she has proven she is permanently and totally disabled and that ongoing treatment with Dr. Chediak is appropriate. Consequently, claimant requests the Board to affirm the Award.

The issues before the Board on this appeal are:

1. What is the nature and extent of injury and disability?
2. Should claimant be awarded ongoing supportive psychotherapy treatment with Dr. Chediak?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the August 2, 2005, Award should be modified to correct the computation of disability benefits,¹ but otherwise affirmed.

Claimant sustained a serious head injury on November 30, 1999, when she was involved in an automobile accident. The parties agree the accident arose out of and in the course of claimant's employment with respondent.

According to Dr. Peter V. Bieri, who examined claimant in August 2002 at the Judge's request, claimant sustained a traumatic brain injury and intracranial hemorrhage, along with injuries to her cervical spine and the right side of her body, due to the November 1999 automobile accident.

Claimant worked for respondent as a housekeeper and supervisor. While recovering from her injuries, in approximately February 2000, claimant attempted to return to work for respondent on a trial basis. Despite having a job coach and despite being relieved of her supervisory duties, claimant concluded she was unable to work due to her physical problems.

¹ The disability benefits are not all due and owing, as stated in the Award.

Later, in approximately the fall of 2001 and spring of 2002, claimant again attempted to return to work for respondent. Again, claimant found she was unable to perform her housekeeping duties despite only working 2 to 2½ hours per day. That was claimant's last attempt to work. Claimant, who was 62 years old² at the time of her March 2004 regular hearing, now draws Social Security disability benefits. At the time of her regular hearing testimony, claimant was living in an assisted-living complex.

Claimant does not believe she could again work as a supervisor for respondent due to short-term memory and anger control problems. Moreover, claimant does not believe she could perform the physical aspects of being a housekeeper due to problems with her balance, her inability to accomplish assigned tasks within an allotted time, and her limited ability to stand. Moreover, following the accident, claimant began experiencing seizures. Claimant now takes Dilantin, which appears to be controlling that problem. But, according to medical statistics, there remains about a 10 percent chance of having other seizures.³

Claimant first testified before Judge Avery at the March 2004 regular hearing. At the conclusion of the hearing, the Judge expressed concern that claimant had not reached maximum medical improvement as claimant's psychiatrist had recommended psychotherapy. Accordingly, the Judge ordered that the regular hearing would be reconvened after claimant's attorney had obtained an update from claimant's psychiatrist. Consequently, the regular hearing testimony was not completed until March 2005.

The Judge's concern regarding claimant's psychiatric condition was justified. The Judge had ordered an earlier psychological evaluation by psychologist James R. Eyman. Dr. Eyman evaluated claimant in July 2002 and concluded claimant had sustained a brain injury and that she was then suffering from depression and having paranoia and delusional thoughts. The Judge also had January 2003 and June 2003 independent medical reports from Dr. Bernard M. Abrams that indicated claimant sustained a significant brain injury and loss of cortical substance and ventriculomegaly.

The record establishes that claimant has sustained both physical and psychological impairment as a result of the November 1999 accident and resulting brain injury.

The most recent update on claimant's mental condition comes from her authorized treating psychiatrist, Dr. Elias Chediak. Dr. Chediak first counseled claimant in 1981 and early 1982 when he provided her with approximately 10 psychotherapy sessions for reactive depression. After the November 1999 accident, claimant returned to Dr. Chediak

² Claimant stated her date of birth is February 1, 1942, but she gave her age as 61. R.H. Trans. (March 1, 2004) at 7.

³ Abrams Depo. at 26.

in September 2000, at which time the doctor began treating claimant for major depression and memory problems. The doctor, who testified in June 2005, indicated he was giving claimant supportive therapy but claimant was then unable to work due to her brain injury and resulting complications. Dr. Chediak, however, did testify that her depression had greatly improved. When discussing the impairment rating he had given claimant for her psychological problems, the doctor explained, in part:

No, no. I have, through the -- from reviewing the records in the last month or so, my impression has been that psychologically she had improved tremendously, and that her inability to work has been related to her memory and her complaint of pain and unable to carry on a full-time eight-hour job.

So psychologically, you know, the depression is reaction to not [being] able to work, how much financial problem this has caused in her life and changes she had to do.⁴

Dr. Chediak admitted he had no experience in rating mental impairment under the *AMA Guides*.⁵ Nevertheless, Dr. Chediak rated claimant as having a 15 percent whole person impairment for her psychological problems. The record, however, also includes Dr. Eyman's opinion that claimant sustained a combined 24 percent whole person impairment due to her mental status and her emotional or behavioral impairments and Dr. Peter V. Bieri's opinion that claimant had a 20 percent whole person impairment due to her emotional behavioral impairments.

In January 2003, Dr. Abrams examined claimant at the Judge's request. The doctor ordered an MRI of claimant's brain, which was performed in April. In interpreting the April 2003 MRI images, Dr. Abrams stated they showed ventriculomegaly (an enlargement of the ventricular system), mild cortical atrophy, and sclerotic hard lesion in the right postcentral gyrus. Dr. Abrams opined that these conditions resulted from the traumatic injury claimant sustained in the automobile accident. Moreover, Dr. Abrams in June 2003 wrote Judge Avery and advised that claimant had sustained a 25 percent whole person permanent impairment due to her cognitive dysfunction.⁶

Dr. Bieri also evaluated claimant's physical impairment. As indicated above, Dr. Bieri saw claimant in August 2002 as requested by Judge Avery. Using the *AMA Guides* (4th ed.), the doctor rated claimant as having a five percent whole person functional

⁴ Chediak Depo. at 36.

⁵ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

⁶ Abrams Depo., Ex. 3.

impairment due to her cervicothoracic spine injuries and a five percent whole person functional impairment due to her upper extremity injuries. The doctor indicated claimant should restrict her activities to the light medium physical demand level as defined by the Dictionary of Occupational Titles, which limits occasional lifting to 35 pounds, frequent lifting to no greater than 20 pounds, and constant lifting to no more than 10 pounds. In addition, Dr. Bieri would restrict claimant from repetitively using her right upper extremity at shoulder level and overhead to only occasionally.

The Board recognizes that much of the evidence from the various experts is somewhat dated. For example, Dr. Eyman saw claimant on one occasion in July 2002 and testified in October 2003, which was many months before the regular hearing was completed in March 2005. Likewise, Dr. Bieri saw claimant in August 2002 and testified in November 2003. Similarly, Dr. Abrams examined claimant in January and October 2003 and testified in February 2004, which was more than a year before the March 2005 regular hearing. Accordingly, the most recent evaluation of claimant's condition comes from Dr. Chediak, who continues to provide claimant with supportive psychotherapy. And Dr. Chediak, as indicated above, believes claimant is unable to work.

Considering claimant's testimony, the testimony of her son regarding how this injury has affected claimant, and the various opinions from the medical and psychological experts, Judge Avery concluded that considering both claimant's physical and mental problems she was unable to work. Therefore, the Judge awarded claimant permanent total disability benefits. The Board affirms that finding and adopts the Judge's findings and conclusions in that regard.

In addition, the Board affirms the Judge's finding and conclusion that claimant should receive ongoing supportive therapy from Dr. Chediak until she is released or until further order. Dr. Chediak's testimony that such supportive psychotherapy was reasonable was uncontradicted.

AWARD

WHEREFORE, the Board modifies the August 2, 2005, Award entered by Judge Avery as follows:

Ava Jane Ellison is granted compensation from Housekeeping Unlimited and its insurance carrier for a November 30, 1999, accident and resulting disability. Based upon an average weekly wage of \$400, Ms. Ellison is entitled to receive 273.95 weeks of temporary total disability benefits at \$266.68 per week, or \$73,056.99, plus 194.78 weeks of permanent total disability benefits at \$266.68 per week, or \$51,943.01, for a permanent total disability and a total award not to exceed \$125,000.

As of January 20, 2006, Ms. Ellison is entitled to receive 273.95 weeks of temporary total disability benefits at \$266.68 per week, or \$73,056.99, plus 46.43 weeks of permanent total disability benefits at \$266.68 per week, or \$12,381.95, for a total due and owing of \$85,438.94, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$39,561.06 shall be paid at \$266.68 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul D. Post, Attorney for Claimant
Joseph M. Backer, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director